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CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
LOS ANGELES

BY: \_\_\_\_\_

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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION

13 CV 13-8821 DMG (MRWx)

14 MICHAEL J. HENRY, an individual,  
15 Plaintiff,

16 v.

17 PRO\*ACT, LLC, a Delaware Limited  
18 Liability Company, and HARVEST  
SENSATIONS, LLC, a Delaware  
19 Limited Liability Company,  
20 Defendants.

CASE NO.

COMPLAINT FOR DAMAGES

1. FMLA Interference
2. Disability Discrimination
3. Failure to Accommodate
4. Failure to Engage in Interactive Process
5. Age Discrimination
6. Wrongful Termination in Violation of Public Policy

DEMAND FOR JURY TRIAL

22  
23  
24 COMES NOW Plaintiff MICHAEL J. HENRY against Defendants, and each  
25 of them, and alleges the following claims for relief:  
26  
27  
28

1  
2 **JURISDICTION**

3 1. Jurisdiction of this Court is invoked pursuant to Section 101 *et seq.* of  
4 the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.*  
5 Subject matter jurisdiction over Plaintiff's FMLA claim is proper pursuant to 28  
6 U.S.C. § 1331.

7 2. As set forth in paragraphs 12 through 36, inclusive, Plaintiff's related  
8 state law claims arise out of a common nucleus of operative facts and form part of  
9 the same case or controversy such that Plaintiff would be expected to try all his  
10 claims in a single judicial proceeding. Accordingly, supplemental jurisdiction over  
11 Plaintiff's related state law claims is proper pursuant to 28 U.S.C. § 1367(a).

12 3. The matter in controversy exceeds the sum of \$75,000. As set forth in  
13 paragraphs 5 through 7, inclusive, Plaintiff and Defendants are of different  
14 citizenship. Consequently, subject matter jurisdiction over all of Plaintiff's claims  
15 for relief is also proper pursuant to 28 U.S.C. § 1332.

16 **VENUE**

17 4. Venue is proper in the Central District of California pursuant to 28  
18 U.S.C. § 1391(b)(2) as a substantial part of the events giving rise to Plaintiff's  
19 claims occurred in Los Angeles, California.

20  
21 **PARTIES**

22 5. Plaintiff Michael J. Henry ("Plaintiff" or "Henry") is and, at all times  
23 relevant hereto, was a resident of the State of California residing in the city of  
24 Orange, California.

25 6. Defendant Pro\*Act, LLC ("Pro\*Act") is a Limited Liability Company  
26 formed under the laws of the state of Delaware and doing business in the State of  
27 California. Pro\*Act is the leading distributor of fresh produce to the food service  
28 industry in the United States. Pro\*Act operates from its principal place of business

1 in Monterey, California and from a second office location in Dallas, Texas.

2 7. Defendant Harvest Sensations, LLC ("Harvest Sensations") is a  
3 wholly owned subsidiary of Pro\*Act and is also a Limited Liability Company  
4 formed under the laws of the state of Delaware and doing business in the State of  
5 California. As a subsidiary of Pro\*Act, Harvest Sensations is a specialty produce  
6 supplier to food service and retail operations in North America. Harvest Sensations  
7 operates from of two warehouse locations in Los Angeles, California and Miami,  
8 Florida.

9  
10 **JOINT EMPLOYER ALLEGATIONS**

11 8. At all times relevant hereto, Harvest Sensations and Pro\*Act both  
12 maintained the practical ability to prevent the alleged violations stated herein,  
13 including the authority to promulgate work rules, assign duties and responsibilities,  
14 maintain control of employees' records, oversee the day-to-day supervision of  
15 employees, administer payroll, maintain and/or modify employees' conditions of  
16 employment, grant leaves of absence, provide reasonable accommodations, and  
17 make determinations regarding the hiring and firing of employees.

18 9. Neither Harvest Sensations nor Pro\*Act may shield themselves from  
19 liability by delegating some level of control to one Defendant. Accordingly,  
20 Harvest Sensations and Pro\*Act are referred to herein collectively as "Defendants"  
21 where appropriate.

22 10. At all times mentioned herein, Defendants were agents, servants,  
23 employees, successors, and/or assigns of each other. Defendants, at all times  
24 mentioned herein, were acting within the course and scope of their authority as  
25 such agents, servants, employees, successors, and/or assigns.

26 11. At all times relevant hereto, Plaintiff was jointly employed by  
27 Defendants in the State of California.  
28

**GENERAL ALLEGATIONS**

12. In June 2006, Plaintiff Henry was employed as the Vice President of Harvest Sensations, LLC. As Vice President, Henry's duties and responsibilities included general oversight of all aspects of Harvest Sensations' operations and performance of a wide variety of tasks as required.

13. For six (6) years, from June 2006 to May 2012, Henry executed his duties and responsibilities as Vice President satisfactorily without issue.

14. In May 2012, Henry informed Harvest Sensations that he would have to undergo a corrective operation to address a deteriorating back condition from which Henry was suffering.

15. Thereafter in May 2012, Harvest Sensations reassigned Henry to spearhead two "Special Projects" in lieu of maintaining his regular duties and responsibilities as Vice President. First, Harvest Sensations charged Henry with the responsibility of finding a larger warehouse facility for Harvest Sensations in Los Angeles. Second, Harvest Sensations burdened Henry with overseeing the implementation of new computer software system entitled "Famous," which is an integrated accounting, inventory, and management software program used by agricultural enterprises to ensure the traceability of produce products "from field to fork."

16. During the discussion informing Henry of his assignment to these "Special Projects," Harvest Sensations assured Henry that he would return to his day-to-day Vice President duties for the Los Angeles Warehouse when the Special Projects were completed.

17. On or about June 1, 2012, Harvest Sensations notified the other employees at the Los Angeles facility that Henry had been assigned to Special Projects and was no longer to be copied on emails regarding day-to-day operations.

18. Commencing in June 2012, Henry underwent a series of corrective operations to address his deteriorating back condition. On June 5, 2012 and July

1 12, 2012, respectively, Henry had two cervical spine surgeries. On September 25,  
2 2012, Henry had a 7-level thoracic fusion, and a clean-up procedure performed on  
3 October 10, 2012.

4 19. Following each of his first two surgeries on June 5, 2012 and July 12,  
5 2012, respectively, Henry returned to work at Harvest Sensations after limited time  
6 off of work and, while on driving restrictions during his recovery, would often  
7 work from home unless he was required to be at Harvest Sensations' Los Angeles  
8 facility for a training session.

9 20. On days when Henry was needed to be at the Los Angeles facility for  
10 training sessions, a family member would drive Henry to and from the facility.  
11 Otherwise, Henry worked from his desk at home.

12 21. With respect to the more extensive 7-level thoracic fusion, Henry  
13 provided notice to Defendants on September 17, 2012 and went out on FMLA  
14 leave effective September 25, 2012. Given the twelve (12) weeks of leave afforded  
15 under the FMLA, Henry was scheduled to return to work on or before December  
16 18, 2012.

17 22. On November 15, 2012, Mary McFarland ("McFarland"), Human  
18 Resources Manager for Pro\*Act, notified Henry by letter that his coverage under  
19 the FMLA ended on December 11, 2012, only eleven (11) weeks after Henry went  
20 out on leave on September 25, 2012.

21 23. On December 12, 2012, Henry's treating physician, Gregory D.  
22 Carlson, informed Harvest Sensations that Henry could return to work from home  
23 on December 17, 2012. Dr. Carlson further informed Harvest Sensations that  
24 Henry would be reassessed in January 2013 for a full return to work at the Los  
25 Angeles facility.

26 24. Chris Coffman ("Coffman"), President of Harvest Sensations,  
27 responded to the note from Henry's treating physician by letter the next day,  
28 December 13, 2012. In the letter, Coffman asserted that Dr. Carlson failed to

1 respond to Harvest Sensations by December 11, 2012, which was the purported  
2 expiration of Henry's FMLA leave as set forth in McFarland's November 15, 2012  
3 letter.

4       25. Coffman stated in the December 13, 2012 letter that the proposed  
5 return to work date of December 17, 2012 was not feasible, that Henry could not  
6 resume his prior duties, and that there was no reasonable accommodation that could  
7 be granted to Henry. Notwithstanding these assertions, Coffman invited Henry "to  
8 suggest what you think you might be able to do within the company."

9       26. Coffman further stated in the December 13, 2012 letter that Henry's  
10 medical coverage would be discontinued after December 31, 2012 and that Henry  
11 would be required to apply for medical coverage under the Consolidated Omnibus  
12 Budget Reconciliation Act ("COBRA") if he wanted to continue his health  
13 coverage at his own expense.

14       27. By email dated December 17, 2012, Henry informed Coffman that,  
15 based upon a start date of September 25, 2012, his FMLA leave did not expire until  
16 the following day, December 18, 2012.

17       28. Coffman responded to Henry's email the same day and acknowledged  
18 the miscalculation regarding Henry's FMLA leave. Notwithstanding Harvest  
19 Sensations' mistake, Coffman asserted that "all other aspects of the [December 13,  
20 2012] letter remain intact."

21       29. On December 24, 2012, Coffman again informed Henry by letter that  
22 "the Company does not currently have a position available based on your  
23 physician's work restrictions."

24       30. Henry responded to Coffman by email on December 27, 2012 and  
25 informed Coffman that Pro\*Act and Harvest Sensations had many employees  
26 serving in a wide variety of roles who performed their job functions remotely, and  
27 that he could perform a number of duties and responsibilities remotely until he was  
28 cleared to commute to Los Angeles in January. Henry also noted that the company



1 would be in the best position to identify a position for him.

2 31. Henry followed up with Coffman again on January 9, 2013 and  
3 indicated that he had not received any response from Harvest Sensations to his  
4 December 27, 2012 email.

5 32. Coffman responded that day and indicated that Harvest Sensations  
6 would get back to Henry "in a day or two."

7 33. The following day, Henry received a letter from Coffman terminating  
8 his employment effective January 9, 2013, the same date of Henry's most recent  
9 attempt to discuss a potential reasonable accommodation with Coffman. In the  
10 letter, Harvest Sensations alleged that Henry failed to engage in the interactive  
11 process.

12 34. Henry received no further response to his emails to Coffman and  
13 Harvest Sensations regarding potential reasonable accommodation.

14 35. At no time did Defendants reinstate Henry to the position of Vice  
15 President, reassign him to Special Projects, or otherwise provide Henry with an  
16 equivalent position of employment.

17 36. On September 25, 2013, Plaintiff Henry filed a complaint of  
18 discrimination with the Department of Fair Employment and Housing ("DFEH").  
19 On September 25, 2103 Henry received a Right-To-Sue-Notice from the DFEH.

20  
21 **FIRST CLAIM FOR RELIEF**

22 (FMLA Interference Against  
23 Defendants, Each of Them)

24 37. Plaintiff realleges and incorporates by reference, as though fully set  
25 forth herein, paragraphs 1 through 36, inclusive.

26 38. At all times relevant hereto, Section 2615 of Title 29 of the United  
27 States Code was in full force and effect and was binding upon Defendants. Section  
28 2615(a)(1) prohibits employers from interfering with, restraining, or otherwise  
denying the exercise of or the attempt to exercise, any right provided under the

1 FMLA.

2 39. As interpreted by the United States Court of Appeals for the Ninth  
3 Circuit, Section 2615(a)(1) applies to employees who take FMLA leave and, as a  
4 consequence, are subjected to discharge by the employer. *Xin Liu v. Amway Corp.*,  
5 347 F.3d 1125, 1133 n.7 (9th Cir. 2003); *Bachelder v. America West Airlines, Inc.*,  
6 259 F.3d 1112, 1124 (9th Cir. 2001).

7 40. At all times relevant hereto, Defendants maintained a workforce of at  
8 least 80 employees at Harvest Sensations' warehouse facility in Los Angeles,  
9 California where Henry worked.

10 41. As alleged in paragraphs 12 and 13, inclusive, Henry had been  
11 employed by Defendants and provided more than 1,250 hours service to  
12 Defendants from Harvest Sensations' warehouse facility in Los Angeles, California  
13 in the 12-month period immediately preceding September 25, 2012.

14 42. As alleged in paragraph 21, inclusive, Henry provided reasonably  
15 sufficient notice to Defendants of his intent to take leave pursuant to the FMLA.

16 43. As alleged in paragraphs 33 and 35, inclusive, Defendants denied  
17 Henry FMLA benefits to which he was entitled when Defendants failed to reinstate  
18 his employment on or about December 18, 2012 and terminated him effective  
19 January 9, 2013.

20 44. The conduct alleged in paragraphs 12 through 36 and 38 through 43,  
21 inclusive, was a substantial factor in causing damage and injury to Plaintiff in an  
22 amount in excess of the jurisdictional requirement of this Court.

23 **SECOND CLAIM FOR RELIEF**  
24 (Disability Discrimination Against  
25 Defendants, and Each of Them)

26 45. Plaintiff realleges and incorporates by reference, as though fully set  
27 forth herein, paragraphs 1 through 36, inclusive.  
28



46. At all times herein mentioned, Government Code section 12940 *et seq.* was in full force and effect and was binding upon Defendants. Section 12940(a) requires Defendants to refrain from discriminating against an employee on the basis of a physical disability.

47. As alleged in paragraphs 14 and 18, inclusive, Plaintiff suffered from a physical disability within the meaning of section 12940 *et seq.*

48. At all times relevant hereto, Plaintiff was qualified to satisfactorily perform the essential duties of his job as the Vice President of Harvest Sensations.

49. As alleged in paragraph 15, inclusive, Plaintiff suffered adverse employment action when Defendants removed Plaintiff's regular duties and responsibilities as Vice President and assigned him to "Special Projects."

50. As alleged in paragraph 33, inclusive, Plaintiff suffered an adverse employment action when Defendants terminated Plaintiff.

51. The conduct alleged in paragraphs 12 through 36, inclusive, constitutes discrimination on the basis of Plaintiff's physical disability.

52. The conduct alleged in paragraphs 12 through 36 and 46 through 51, inclusive, was a substantial factor in causing damage and injury to Plaintiff in an amount in excess of the jurisdictional requirement of this Court.

53. Defendants, and each of them, have acted for the purpose of causing Plaintiff to suffer financial loss and are guilty of oppression and malice, justifying an award of exemplary damages.

### THIRD CLAIM FOR RELIEF (Failure to Accommodate Against Defendants, and Each of Them)

54. Plaintiff realleges and incorporates by reference, as though fully set forth herein, paragraphs 1 through 36, inclusive.

55. At all times herein mentioned, Government Code section 12940 *et seq.* was in full force and effect and was binding upon Defendants. Section 12940(m)

1 requires Defendants to make reasonable accommodation for the known disabilities  
2 of employees in order to enable them to perform a position's essential functions.

3 56. As alleged in paragraphs 14, 18, and 23 through 34, inclusive,  
4 Defendants were aware of Plaintiff's physical disability and failed to reasonably  
5 accommodate Plaintiff.

6 57. At all times relevant hereto, Plaintiff was competent to perform and  
7 could have performed the essential job functions of Vice President with reasonable  
8 accommodation.

9 58. The conduct alleged in paragraphs 12 through 36 and 55 through 57,  
10 inclusive, was a substantial factor in causing damage and injury to Plaintiff in an  
11 amount in excess of the jurisdictional requirement of this Court.

12 59. Defendants, and each of them, have acted for the purpose of causing  
13 Plaintiff to suffer financial loss and are guilty of oppression and malice, justifying  
14 an award of exemplary damages.

15  
16 **FOURTH CLAIM FOR RELIEF**  
17 (Failure to Engage in the Interactive Process  
Against Defendants, and Each of Them)

18 60. Plaintiff realleges and incorporates by reference, as though fully set  
19 forth herein, paragraphs 1 through 36, inclusive.

20 61. At all times herein mentioned, Government Code section 12940 *et seq.*  
21 was in full force and effect and was binding upon Defendants. Section 12940(n)  
22 requires Defendants to engage in a timely, good faith interactive process to  
23 determine effective reasonable accommodations for employees with disabilities.

24 62. As alleged in paragraphs 14, 18, and 23 through 34, inclusive,  
25 Defendants were aware of Plaintiff's physical disability and failed to take steps to  
26 engage in an interactive process to determine an effective reasonable  
27 accommodation for Plaintiff.

63. The conduct alleged in paragraphs 12 through 36 and 61 to 62, inclusive, was a substantial factor in causing damage and injury to Plaintiff in an amount in excess of the jurisdictional requirement of this Court.

64. Defendants, and each of them, have acted for the purpose of causing Plaintiff to suffer financial loss and are guilty of oppression and malice, justifying an award of exemplary damages.

**FIFTH CLAIM FOR RELIEF**  
(Age Discrimination Against  
Defendants, and Each of Them)

65. Plaintiff realleges and incorporates by reference, as though fully set forth herein, paragraphs 1 through 36, inclusive.

66. At all times relevant hereto, Government Code section 12940 *et seq.* was in full force and effect and was binding upon Defendants. Section 12940(a) requires Defendants to refrain from discriminating against an employee on the basis of age.

67. At all times herein mentioned, Plaintiff was over 60 years of age.

68. At all times relevant hereto, Plaintiff was qualified to perform and could satisfactorily perform the essential job duties of his job as the Vice President of Harvest Sensations.

69. As alleged in paragraph 15, inclusive, Plaintiff suffered adverse employment action when Defendants removed Plaintiff's regular duties and responsibilities as Vice President and assigned him to "Special Projects."

70. As alleged in paragraph 33, inclusive, Plaintiff suffered an adverse employment action when Defendants terminated Plaintiff.

71. During Plaintiff's leave of absence and continuing after Plaintiff's termination, Defendants reassigned Plaintiff's duties and responsibilities, both as to his position as Vice President and with respect to the Special Projects, to other employees who were significantly younger than Plaintiff.

1           72. The conduct alleged in paragraphs 12 through 36 and 66 through 71,  
2 inclusive, was a substantial factor in causing damage and injury to Plaintiff in an  
3 amount in excess of the jurisdictional requirement of this Court.

4           73. Defendants, and each of them, have acted for the purpose of causing  
5 Plaintiff to suffer financial loss and are guilty of oppression and malice, justifying  
6 an award of exemplary damages.

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8                           **SIXTH CLAIM FOR RELIEF**  
9                           (Wrongful Termination in Violation of Public Policy  
                              Against Defendants, and Each of Them)

10           74. Plaintiff realleges and incorporates by reference, as though fully set  
11 forth herein, paragraphs 1 through 36, inclusive.

12           75. The public policy of the State of California is codified in Government  
13 Code section 12940 *et seq.* as well as through the provisions of the FMLA, which  
14 represents the federal counterpart to the California Family Rights Act ("CFRA").  
15 All of the aforementioned statutes were in full force and effect and were binding  
16 upon Defendants at all times relevant hereto.

17           76. As alleged in paragraphs 12 through 36, inclusive, Plaintiff was an  
18 employee of Defendants and suffered an adverse employment action when  
19 Defendants terminated Plaintiff.

20           77. The conduct alleged in paragraphs 12 through 73, inclusive,  
21 constitutes wrongful termination in violation of public policy.

22           78. Defendant's termination of Plaintiff was a substantial factor in causing  
23 damage and injury to Plaintiff in an amount in excess of the jurisdictional  
24 requirement of this Court.

25           79. Defendants, and each of them, have acted for the purpose of causing  
26 Plaintiff to suffer financial loss and are guilty of oppression and malice, justifying  
27 an award of exemplary damages.

1           WHEREFORE, Plaintiff MICHAEL J. HENRY prays for judgment against  
2 Defendants, and each of them, as follows:

3           **As to the First Claim for Relief:**

- 4           1.     For lost wages, employment benefits, and other compensation  
5 pursuant to 29 U.S.C. § 2617(a)(1)(A)(i)(I);  
6           2.     For prejudgment interest pursuant to 29 U.S.C. § 2617(a)(1)(A)(ii);  
7           3.     For liquidated damages pursuant to pursuant to 29 U.S.C. §  
8 2617(a)(1)(A)(iii);  
9           4.     For reasonable attorney's fee, reasonable expert witness fees, and  
10 other costs of the action pursuant to 29 U.S.C. § 2617(a)(3);

11           **As to the Second Claim for Relief:**

- 12           5.     For general damages according to proof;  
13           6.     For special damages for lost earnings according to proof;  
14           7.     For attorney's fees pursuant to Government Code section 12965(b)  
15 and/or any other applicable provision of law;  
16           8.     For prejudgment interest pursuant to Civil Code section 3287 and/or  
17 any other provision of law providing for prejudgement interest;  
18           9.     For punitive damages according to proof;

19           **As to the Third Claim for Relief:**

- 20           10.    For general damages according to proof;  
21           11.    For special damages for lost earnings according to proof;  
22           12.    For attorney's fees pursuant to Government Code section 12965(b)  
23 and/or any other applicable provision of law;  
24           13.    For prejudgment interest pursuant to Civil Code section 3287 and/or  
25 any other provision of law providing for prejudgement interest;  
26           14.    For punitive damages according to proof;

27           **As to the Fourth Claim for Relief:**

- 28           15.    For general damages according to proof;

1           16. For special damages for lost earnings according to proof;

2           17. For attorney's fees pursuant to Government Code section 12965(b)  
3 and/or any other applicable provision of law;

4           18. For prejudgment interest pursuant to Civil Code section 3287 and/or  
5 any other provision of law providing for prejudgement interest;

6           19. For punitive damages according to proof;

7           **As to the Fifth Claim for Relief:**

8           20. For general damages according to proof;

9           21. For special damages for lost earnings according to proof;

10          22. For attorney's fees pursuant to Government Code section 12965(b)  
11 and/or any other applicable provision of law;

12          23. For prejudgment interest pursuant to Civil Code section 3287 and/or  
13 any other provision of law providing for prejudgement interest;

14          24. For punitive damages according to proof;

15          **As to the Sixth Claim for Relief:**

16          25. For general damages according to proof;

17          26. For special damages for lost earnings according to proof;

18          27. For punitive damages according to proof;

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**As to All Claims for Relief:**

28. For cost of suit incurred herein;

29. For attorney's fees as provided by law;

30. For prejudgment interest as provided by law; and

31. For such other and further relief as the Court may deem just and proper.

**DATED:** November 26, 2013

**POSNER & ROSEN LLP**

By: 

HOWARD Z. ROSEN  
JASON C. MARSILI  
BRIANNA M. PRIMOZIC  
Attorneys for Plaintiff  
MICHAEL J. HENRY

**DEMAND FOR JURY TRIAL**

Plaintiff MICHAEL J. HENRY hereby demands a jury trial on all claims for relief.

**DATED:** November 26, 2013

**POSNER & ROSEN LLP**

By: 

HOWARD Z. ROSEN  
JASON C. MARSILI  
BRIANNA M. PRIMOZIC  
Attorneys for Plaintiff  
MICHAEL J. HENRY